5. The costs are to be borne by the corporation except if the corporation makes an offer and it is not accepted "and failure to accept such offer was arbitrary and vexatious and not in good faith."

6. Any stockholder demanding payment ceases to be a stockholder as of the date of such demand except for the purpose of receiving payment for his shares.

7. Payment for shares of objecting stockholders is to be made simultaneously with the surrender of the shares.

8. Each stockholder shall submit his shares for notation indicating that the shares are subject to litigation to determine their value. Upon transfer of shares so stamped the transferee shall have only the rights to receive the value of the shares as determined above.

§ 49. *Cumulative voting.* The certificate of incorporation of any stock corporation or other certificate filed pursuant to law may provide that at all elections of directors of such corporation each stockholder shall be entitled to as many votes as shall equal the number of votes which (except for such provisions as to cumulative voting) he would be entitled to cast for the election of directors with respect to his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit, which right, when exercised, shall be termed cumulative voting. The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provisions of this section.

Appendix

(4) Opinions below, in chronological order.

(a) *Nathan Katz* v. *R. Hoe & Co. Inc. October 4, 1950, Appellate Division grants a stay of consolidation pending trial of action.*

Supreme Court, Appellate Division, First Department. Oct. 4, 1950. G. B. Garfield, New York City, for Katz. N. P. Cullom, New York City, For R. Hoe & Co. and others. G. C. Baron, New York City, for Martin. In view of the circumstance that this action is scheduled to be tried in the immediate future and the parties having consented on oral argument to an immediate trial, and no substantial prejudice to defendants-respondents being involved and in order to preserve in so far as possible, the status quo, the order appealed from is unanimously modified so as to stay R. Hoe & Co., Inc., its officers, servants and employees, from filing in the office of the Secretary of State the certificate of consolidation of said corporation and Hoe Export-Import Corporation, and from taking any and all other or further proceedings with respect to the consolidation of said corporations or the recapitalization or classification or reclassification of them or either of them, whether pursuant to sections 86 or 35 of the Stock Corporation Law or otherwise, pending the trial and determination of this action, and for at least five days after the entry of final judgment therein and, as so modified, affirmed. Settle order on notice.

(b) *Nathan Katz etc.* v. *R. Hoe & Co., Inc. October 27, 1950 Trial Term New York County Opinion dismissing Second Amended Complaint on the mertis after trial*:

Opinion.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK,

Trial Term: Part XIV.

NATHAN KATZ, etc.

v.

R. HOE & Co., INC., et al.

COHALAN, J.:

In this action, two common stockholders of the corporate defendant (hereinafter referred to as "Hoe") seek to enjoin a consolidation of Hoe with a wholly-owned subsidiary corporation.

On the day the trial in this case was concluded and when the matter was *sub judice* (the Court awaiting the briefs of the litigants), plaintiff applied to the United States District Court for the Southern District of New York for substantially the same relief he asks in this litigation.

This action necessitates an examination of the question as to whether this Court has jurisdiction of the issues presented here. This question being of basic importance —common courtesy and proper advocacy dictate that it should have been presented directly to this Court, particularly as the issues here had not been finally submitted. It is academic that no Court should proceed in any matter unless and until it has jurisdiction. When the trial opened, it was of record that plaintiff (an attorney) and his counsel had served a complaint and an amended complaint and

had been to the Appellate Division on an appeal from an order of this Court. At the trial they asked and obtained leave to serve and file a second amended complaint. The defendant, Martin, in his answer had asked substantially the same relief as the plaintiff. The plaintiff served his third complaint, Martin served another pleading in which he set up new matter. It follows that there can be no question so far as jurisdiction *in personam* is concerned, these two litigants having on more than one occasion sought relief from this Court in the premises and the defendant having duly appeared. By conducting the trial, they accentuated their selection of the forum to which they had in the first instance appealed. As to jurisdiction *in rem,* it appears that the corporate defendant was created by the laws of the State of New York. Consolidation with another corporation (likewise a New York corporation) is in contemplation. The internal management of such corporations, their rights and powers are set forth in the laws of this state as well as in their charters of incorporation issued under those laws. Accordingly, it is held that this Court has jurisdiction both *in personam* and *in rem* of the parties and the issues here litigated. (*Pennoyer* v. *Neff,* 95 U. S. 714; *Mullane* v. *Central Hanover Trust Company,* 339 U. S. 306; *Matter of Matheson,* 265 N. Y. 81; *Matter of Buckman,* 270 App. Div. 707.)

Proceeding to the mertis of the controversy as submitted at the trial: Hoe underwent a reorganization in the United States Court for this district in 1935. At that time preferred stock was issued to take care of the claims of creditors. Behind this stock there was Class A stock and common stock. As of September 1946, the preferred stock had been paid and was retired. At that time the arrears of dividends on the Class A stock amounted to $83 per share. By means of a consolidation with a wholly-owned subsidiary in 1947, the stock setup was changed so

that thereafter there were three classes of stock, the present A, B stock, and the common. Largely by means of the issuance of the B stock the arrears on the A stock were discharged. At none of the times above mentioned did the common stockholders have the right to vote on the consolidation of Hoe with any other corporation.

Control of the company under that reorganization plan was first in the preferred stockholders and was exercised by cumulative voting for a fixed number of directors (11) 6 to be elected by the preferred stockholders and 5 by the Class A stockholders. Upon the retirement of the preferred stock and the 1947 consolidation, control passed to the A stockholders who then elected 9 of the directors, while common stockholders elected 2. Under this plan, when and if the dividends on the Class A stock were fully paid and the B stock retired, common stockholders would have the right to elect 6 of the 11 directors. As of 1950, a considerable quantity of the B stock amounting to approximately $3,900,000 is still outstanding.

By means of the consolidation now proposed (and which it is sought by this action to enjoin) the B stock is to be retired and only A and common stock will remain. Under this plan, the entire common stock of the consolidated corporations will be placed on an annual dividend basis and a sinking fund set up to retire the Class A stock with the provision that the right of the common to elect directors will increase in proportion to the redemption and retirement of the A stock. The ultimate goal contemplated is to be the creation of a single stock structure. During the period in which these purposes are to be carried out, the A stockholders will elect a majority of the directors.

The present action seeks to enjoin the consolidation on the grounds of fraud and deprivation of the rights of the present common stockholders. It is clear that the con-

solidation as proposed is not illegal. It is equally clear that by the terms of the certificate of incorporation and the plans in existence as of 1950, the present common stockholders have no right to vote on the proposed consolidation. A point is made that what is being accomplished through the guise of a consolidation is, in effect, a recapitalization and that under § 35 of the Stock Corporation Law, any provision in the certificate of incorporation to the contrary notwithstanding, all the stockholders have the right to be heard.

On the submitted evidence, this Court is unwilling to hold that the consolidation is a ruse by means of which the provisions of § 35 are being avoided. There has been no showing of fraud and while a serious effort has been made to show that the plan will not be beneficial to the corporation itself and will be harmful to the common stockholders, such a showing has not been made and no basis has been presented which would justify this Court in exercising its visitorial powers.

It should always be borne in mind in these cases that the Court, in the absence of a very plain showing of either fraud or improvidence, will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature. (*Zobel* v. *American Locomotive Company,* 182 Misc. 323; *Turner* v. *The American Metal Company,* 268 App. Div. 239.)

If any of the common stockholders are of the opinion that their interests will be damaged by the proposed consolidation they have an adequate remedy under § 21 of the Stock Corporation Law. In *Anderson* v. *International Minerals & Chemical Corp.,* 295 N. Y. 343, the Court states: "If proceeding in accordance with the statute a consolidation is duly consummated there are but two alternative rights which survive to the holders of the old

shares: to take the new shares under the terms and conditions of consolidation or to take the value of the old shares determined in accordance with § 21." See also, *Beloff* v. *Consolidated Edison Company*, 300 N. Y. 11.

The complaint and cross-complaint are accordingly dismissed without costs.

This is intended to be the decision of the Court and the parties are directed to settle judgment on notice.

DENIS O'L. COHALAN
J. S. C.

Dated: October 27, 1950.

(c) *Memorandum opinion, John F. X. McGohey, D. J. in companion case November 6, 1950.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

R. HOE & Co., INC.,

Debtor.

In Bankruptcy No. 60162

McGOHEY, D. J.

The proceedings for the reorganization of the debtor were terminated by order of July 10, 1935. It was thereby adjudged that the debtor be discharged and that it be revested with its properties. The petitioner concededly was not a stockholder at the time of the reorganization proceedings. He purchased his 500 shares on December 23, 1949, just about the time the debtor was about to effect a consolidation pursuant to the New York Stock Corporation Law. The petitioner undertook to prevent the consolidation. He seemed to realize, correctly, that his recourse had to be to the state court to seek injunction against possible violation of the local law, rather than to seek relief here under the theory he now advances. He did institute an action in New York. A temporary injunction was there denied and, after a prompt trial, judgment was entered against him. While the matter was awaiting decision by Mr. Justice Cohalan, and without advising him, this petition was filed here. It seeks the identical relief prayed for in the state court action. The only thing dif-

ferent here is the theory. It is here claimed that petitioner is proceeding under the "reserved jurisdiction" of the bankruptcy court, to enjoin alleged disobedience of the reorganization plan.

It is well settled that the bankruptcy court should not and indeed cannot indefinitely keep "leading strings"[1] on or be a "nurse"[2] to reorganized concerns. This reorganized debtor was in 1935 sent "out into the state as fully subject to state law as though this court had nothing to do with its creation."[3] The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court.[4] A less worthy appeal to the court's equity power is impossible to imagine.

The petition for injunction is in all respects denied.

Submit order.

Dated: New York, N. Y., November 6, 1950.

John F. X. McGohey,
JOHN F. X. McGOHEY,
U. S. D. J.

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[1] *In re Flatbush Ave.-Nevins St. Corp.*, 2 Cir., 133 F. 2d 760.

[2] *North American Car Corp.* v. *Peerless W. & V. Mach. Corp.*, 2 Cir., 143 F. 2d 938.

[3] *In re Ambassador Hotel Corp.*, 2 Cir., 124 F. 2d 435.

[4] *Davega-City Radio, Inc.* v. *Boland*, S. D. N. Y., 23 F. Supp. 969, 970.

(d) *Nathan Katz* v. *R. Hoe & Co. Inc. April 25, 1951. Appellate Division opinion on affirmance of Justice Cohalan's judgment of dismissal and order denying motion for a new trial.*

Per Curiam. This action by a holder of common stock of a corporation claiming to sue on behalf of himself and all other common stockholders, was instituted primarily for an injunction to restrain a corporate consolidation. Months before the appeal was heard, the consolidation had been fully consummated and the stock of the corporation reissued in accordance therewith, after plenary trial in which Special Term had entered judgment in defendant's favor dismissing the complaint on the merits.

Relief was also sought on the ground of fraud but the evidence supports the trial court's finding that there was no fraud.

The action is in equity. As a result of the consummated consolidation, rights have accrued to third parties; a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action, joined only by defendant Martin, another common stockholder and also a director. Great numbers of the class plaintiff presumes to represent have exchanged their shares in accordance with the executed and completed plan of consolidation or had previously petitioned for an appraisal of their stockholdings.

Under the state of facts disclosed, the judgment in favor of defendants-respondents dismissing the complaint and cross complaint, and the order denying plaintiff's motion for a new trial, should be affirmed.

OCT 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. HOE & CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF OF RESPONDENTS IN OPPOSITION

NEIL P. CULLOM,
Counsel for Respondents.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6

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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. HOE & CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the trial court (R. 650-654) is reported at 199 Misc. 459, aff'd 278 App. Div. 766, motion for leave to appeal denied 302 N. Y. ——. The opinion of Special Term denying motion for temporary injunction is reported at 99 N. Y. Supp. 2nd 899, aff'd 277 App. Div. 966. The opinion of the United States District Court for the Southern District of New York in a suit for the same relief between the same parties is reported at 93 F. Supp. 762, appeal dismissed 186 F. 2d 716.

Jurisdiction

Jurisdictional requisites are lacking.

Question Presented

Whether a single stockholder owning 3/1000ths of one issue of stock can enjoin a consolidation, under section 86 of the New York Stock Corporation Law, between respondent and its subsidiary, which has already been fully consummated, in view of the findings of all of the state and Federal courts which passed on the case, that petitioner's contentions that the consolidation was fraudulent, illegal, involved the denial of his right to vote thereon, was unfair, that the court should substitute its judgment for that of the directors as to the economic wisdom of the plan and that petitioner had no adequate remedy at law, are groundless.

Statute Involved

Section 86 of the New York Stock Corporation Law.

Statement

This brief is submitted in behalf of defendants-respondents in opposition to petition of plaintiff-petitioner for a writ of certiorari to the New York Supreme Court, Appellate Division, First Department. The judgment of the Supreme Court, New York County, now under attack, was entered April 27, 1951 upon an order of the Appellate Division, First Department, which unanimously affirmed the judment of the Supreme Court, dismissing the complaint on the merits (R. 47, 48).

The suit was brought in equity to restrain R. Hoe & Co., Inc., a New York corporation, hereinafter referred to as "Hoe", its directors and officers, from holding a meeting of Class A stockholders on September 12, 1950 to vote upon a proposed consolidation under section 86, Stock Corporation Law, with its wholly owned subsidiary, Hoe Export-Import Corporation; and thereafter from consummating the consolidation. A tax free exchange of securities, the plan resulted in a much-needed simplification of the corporate structure. For details of the plan see pages 9-10, *post*. No pecuniary or any other benefit accrued to any officer or director of the company as the result of this consolidation.

The gravamen of petitioner's alleged grievance is that defendants "fraudulently deprived the common stockholders of their right to vote on the consolidation." No such right ever existed and all the courts which have passed upon this question have unanimously so held. The company's charter (Martin's Ex. A 5(k)—R. 506) provides:

> "The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of the Class A stock except that the Common stock, voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the Corporation pursuant to Section 105 of the Stock Corporation Law of the State of New York and shall be specifically excluded from the right to vote in a proceeding * * * *for establishing priorities or creating preferences among the several classes of stock pursuant to Section 36* (now 35); * * *
>
> *"for consolidation pursuant to Section 86 of the Stock Corporation Law* * * *."

The above provisions are deliberately omitted from the statement of "voting rights of the common stock" in the appendix to petitioner's brief (pp. 37, 38).

Status of the Parties

It is significant that the consolidation is not challenged by the holders of any of the 95,997 shares of Class A stock, the 194,767 shares of B stock or the 160,000 shares of common stock, except Katz. He acquired record title to 500 shares of common stock out of 160,000 shares, or 3/1000ths of the issue (last in the order of seniority) on December 23, 1949 at about the time when a readjustment of Hoe's capital structure was under consideration. Another common stockholder, one Martin, originally joined him, but has abandoned the suit.

Status of the Consolidation

The Class A stockholders meeting was held on September 12, 1950 and the consolidation approved by a vote of 77% of the issued and outstanding stock (R. 260). After a plenary trial at Special Term the complaint was dismissed on the merits (*Katz* v. *Hoe,* 199 Misc. 459); and that judgment was unanimously affirmed by the Appellate Division (278 App. Div. 766).

After the Appellate Division had denied petitioner's application for a stay pending appeal, the consolidation was fully consummated on November 29, 1950 by the filing of the required certificate with the Department of State of the State of New York; and pursuant thereto new securities, in exchange for the old, of a current market value of upwards of $10,000,000 have been issued and dividends declared and paid thereon. These securities have been bought, sold and traded in on the New York Curb Exchange and over-the-counter; and the rights of the holders thereof have become vested.

Prior Proceedings

Petitioner applied for a temporary injunction which was denied on the following grounds (99 N. Y. Supp. 2d 899):

> (1) That a consolidation by one corporation with its wholly owned subsidiary is legal;
>
> (2) That the right of appraisal under sections 87 and 21 of the Stock Corporation Law, if not an exclusive remedy, "eliminates any contention of irreparable injury and lack of an adequate remedy at law"; and
>
> (3) That a balancing of equities "is clearly in favor of the defendant".

The order was unanimously affirmed (277 App. Div. 966).

When the case was *sub judice* before Mr. Justice COHALAN, surreptitiously and without informing him, Katz, this petitioner, brought suit in the United States District Court for the Southern District of New York for identically the same relief and on the same grounds. His petition there was dismissed, the court holding (93 F. Supp. 762):

> "A less worthy appeal to the court's equity power is impossible to imagine."

After the consolidation had been consummated, a motion to dismiss the appeal was made by respondent herein. That motion was granted, the appeal dismissed, and rehearing denied by the United States Court of Appeals, Second Circuit (*In the Matter of R. Hoe & Co., Inc.*, 186 F. 2d 716). This proceeding will be discussed at pages 17-22, *post*.

The Pleadings

Petitioner served three different complaints all in a period of six weeks, in a confused and desperate attempt to discover some theory upon which liability could be fastened upon defendants.

The second amended complaint alleged that by virtue of certain orders issued in the receivership proceeding of 1935, wherein Hoe was the debtor, the common stock was entitled to vote on the consolidation; that the organization of the subsidiary and the consolidation therewith were illegal, "fraudulent and ill-conceived". The prayer for relief was for an injunction restraining Hoe from holding the meeting on September 12, 1950 and for judgment *"declaring the meeting,"* if held, void (R. 15).

The following very significant admissions under oath were made at various times by petitioner in his formal pleadings. In the original complaint verified by Katz on August 17, 1950 and in the first amended complaint verified by his attorney, Gustave B. Garfield, on August 28, 1950, it is alleged (R. 647):

> "That the certificate of incorporation of said corporate defendant provides, that the holders of the B stock and common stock thereof, shall be specifically excluded from the right to vote in a proceeding for consolidation pursuant to Section 86 of the Stock Corporation Law."

The answer of respondents (after admitting the foregoing allegation) is, in effect, a general denial and pleads by way of affirmative defense that plaintiffs have an adequate remedy at law (R. 31, 32).

The Extraordinary Limitations and Restrictions Imposed Upon the Common Stock by the Federal Court Receivership

The common stock (true, only a *de minimus* splinter) now claiming the veto power over this consolidation has an interesting background. Historically, it appears that the A stock contributed the bulk of the capital of the corporation and that the common stock, in large part, was issued to promoters who paid nothing therefor and provided no capital.

In 1932 the company was petitioned into an equity receivership in the United States District Court for the Southern District of New York from which it emerged in 1935 with a plan of adjustment, approved by the District Court, which included the certificate of incorporation, as amended, containing the provisions set forth below. These provisions existed as of the date of this consolidation.

As of September 30, 1935, the debt and equity issues, eight in number, senior to common stock amounted to $15,621,916.36 and the per share deficit of common stock at that time was $56.51 (Hoe's Ex. AU). This explains, in part, the following most unusual and extraordinary restrictions and limitations upon the common stock. Section 5 (k) of the company's charter, as amended, provides (Ex. A to Pl. Ex. 4—R. 466, 506):

> "(k) The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of the Class A stock except that the Common stock, voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the Corporation pursuant to Section 105 of the Stock Corporation Law of the State of New York; and

"Shall be specifically excluded from the right to vote in a proceeding;

"For mortgaging the property and franchises of the Corporation pursuant to Section 16;

"For guaranteeing the bonds of another corporation pursuant to Section 19;

"For sale of the franchises and property pursuant to Section 20;

"*For establishing priorities or creating preferences among the several classes of stock pursuant to Section 36* (now 35);

"*For consolidation pursuant to Section 86 of the Stock Corporation Law;* or

"For change of name pursuant to the General Corporation Law; * * *"

It thus appears that not only were all voting rights (with immaterial exceptions) vested in Class A stock but the common stock was "specifically excluded" from voting on a consolidation pursuant to section 86, as well as from the right to vote "for establishing priorities or creating preferences" pursuant to section 36, now 35.

It is also of vital significance that prior to the receivership under the company's charter the common stock could not be increased beyond 160,000 shares or any of its provisions changed, without the consent of two-thirds of the common (R. 592). In the plan approved by the Federal court this provision was entirely eliminated and there remained no prohibition against dilution of the common stock or the change of any of its provisions, without its consent (Ex. A to Pl. Ex. 4—R. 466).

This common stock was not really a stock—it was actually only a warrant. It had no claim then or in the foreseeable future on assets or earnings. It simply represented,

as petitioner's expert admitted, "a hope for better things" (R. 201).

In contrast every pre-emptive right was granted to the Class A stock, including the right to elect nine directors, the right to receive $4 annual cumulative dividends, to receive $65 per share on voluntary liquidation and $60 per share on involuntary liquidation and to participate in dividends in excess of $4 (Ex. A to Pl. Ex. 4—5(k)—R. 466).

As of June 30, 1950 the net asset value per share of Class A stock was $72.87 (R. 641) and the per share net deficit of the common was $19.62 (R. 332).

Prior to this consolidation no dividends could be paid to the common stock until the B stock is entirely eliminated and all dividends on the Class A stock are current. There were outstanding 194,767 shares of B stock, callable at $20 per share (R. 19). The right to dividends might have been deferred for an indeterminate number of years.

Advantages of the Plan to the Common Stock

The plan represented management's effort to reconcile the conflicting interests of Hoe's three classes of securities, without the creation of debt. To accomplish this, it was necessary for each class of stock to give up certain rights and to accept other rights in lieu thereof. Under the plan the A stock was diluted to the extent of 20.2% in assets and earnings (R. 364) or a per share dilution in net asset coverage of $19.57 per share and a dilution in earnings of $4.20 per share (R. 641). The B stock instead of receiving $20 per share, received the equivalent of about $13 (the present value of $20, discounted at 6%, seven years hence) (R. 368). The objectives of the plan and the benefits conferred thereby on the common stock were:

1. *Elimination of the B stock constituting a claim on assets of $3,900,000 senior to the common stock.* This likewise involved the elimination of the B stock redemption fund which had, during the three fiscal years 1947-1949, constituted a drain on earnings of $626,000 per annum.

2. *The consolidation not only eliminated the B stock immediately but will ultimately, through the operation of the sinking fund, eliminate the A stock.* Upon the basis of the new capitalization, the common stock will then be the only surviving stock, with full rights of ownership and voting control.

3. *Immediate establishment of the common stock on a dividend basis (for the first time in the history of the company).* Under the company's old charter, no dividends could be paid on the common stock until the elimination of the $3,900,000 of B stock. Dividends were declared and paid on this stock on January 15, 1951, April 15, 1951, July 15, 1951 and October 15, 1951.

4. *Elimination of A stock dividend participation.* Under the old charter, after the payment of dividends of $4 per annum on Class A stock and $1 per share on the old common stock, Class A participated to the extent of one-third of additional dividends up to $7 per share. Under the plan of consolidation this right of the Class A stock was eliminated.

5. *Elimination of cumulative voting.* This system of voting had been extremely costly to the company; it had enabled market raiders and stock speculators to force their way on the board (R. 529-531, 528); and its elimination, in the opinion of the directors, will have a tendency to discourage, if not eliminate, recurrent attacks by self-seeking pressure groups, with resultant costly and damaging effects upon the company's customer, competitor and personnel relations.

No one can deny that the foregoing constitute very real, present and substantial benefits to the common stock. The trial judge so found (R. 652, 653).

The Opinion of the Trial Court

The learned trial judge, in an opinion notable for its clarity and accuracy, held: (1) that there was no proof of fraud or illegality; (2) that the consolidation was not a "subterfuge" or "ruse" to avoid the provisions of section 35, Stock Corporation Law; (3) that section 51, Stock Corporation Law, was inapplicable; (4) that the common stock had no right to vote on the consolidation; and (5) that plaintiffs have an adequate remedy at law (R. 650-654).

The Appellate Division unanimously "in all things affirmed" these findings of fact, conclusions of law and the judgment based thereon (R. 665, 666). In a *per curiam* opinion the court, after pointing out that the suit was "instituted primarily for an injunction", that the consolidation had been fully consummated and securities issued thereunder, said:

> "Relief was also sought on the ground of fraud but the evidence supports the trial court's finding that there was no fraud.
>
> "The action is in equity. As a result of the consummated consolidation, rights have accrued to third parties; a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action, joined only by defendant Martin, another common stockholder and also a director. Great numbers of the class plaintiff presumes to represent have exchanged their shares in accordance with the executed and completed plan of consolidation or had previously petitioned for an appraisal of their stockholdings."

The court made pointed reference to the fact that plaintiff was "*claiming* to sue on behalf of himself and other common stockholders" and that "great numbers of the class plaintiff *presumes* to represent" have exchanged their

shares or sought appraisal. The court thus put its finger squarely on the lack of equity of Katz' position in trying to veto the consolidation with a bare 500 shares of common stock.

The Issue

The following facts are now finally conceded:

Petitioner, in his brief before the Appellate Division stated that the consolidation by a corporation with its wholly owned subsidiary is "entirely legal."

All parties agree that the present charter of the corporation provides that the common stock "shall be specifically excluded from the right to vote in a proceeding for consolidation pursuant to section 86 of the Stock Corporation Law" (R. 647); and that except for the right to elect two directors and to vote on voluntary dissolution, common stockholders "have no voting rights of any kind whatever" (R. 647).

The entire case therefore comes down to this simple proposition: Petitioner contends that there are two permissible alternatives, *i. e.*, recapitalization through a consolidation under section 86; or by amendment under section 35 (the common stock had renounced its right to vote on either); and that defendants chose the former rather than the latter which petitioner prefers; *ergo*, fraud. Respondents on the other hand, contend that there was no legal compulsion to select the latter alternative, and that, in fact, all the existing equities in the case required the selection of the former. The per share net asset value of the A stock being $72.87 and the per share *net deficit* of the common being $19.62, it would have been a gross betrayal of trust for the directors to have countenanced any scheme which would transfer voting control and from 40%

to 60% of the company's equity, from the owners of the company, the A stock, to the common stock.

With the issue thus clearly defined, there can be, we submit, but one answer, viz., that defendants were entirely within their rights, legal and moral, in adopting the consolidation process.

Argument

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this court on certiorari.

As we shall presently demonstrate, there are no Constitutional or Federal questions in this case. It involves, at most, $4,000. It is of utterly no importance to the jurisprudence of the country and represents only one man's efforts to defeat a recapitalization which has been overwhelmingly approved by the stockholders. This court has no jurisdiction of the controversy. It can be said, with little fear of contradiction, that of all the frivolous and unmeritorious petitions for a writ which have ever been presented to this court, the instant application heads the list. In fact, it is so frivolous and devoid of merit that the conclusion is inescapable that it constitutes an effort to harass, annoy and cause expense, rather than reflecting real hope that the petition will be granted. So viewed, it is a clear abuse of the court's process. Not only has petitioner gone far outside the record but he and his counsel have even gone to the extreme of manufacturing out of whole cloth a quotation from Wormser on The Disregard of the Corporate Fiction (p. 18). The language there attributed to Wormser was never uttered by him.

Moreover, we challenge the authority of Mr. Garfield to file this petition on behalf of the petitioner. "An attorney's power to represent a party to an action which he has

instituted ceases upon the entry of final judgment and the issuance of execution thereon, unless his authority is extended by special agreement" (*Weiner* v. *Jones*, 245 App. Div. 17, 18; *Conklin* v. *Conklin*, 133 *id.* 743). There is no evidence that petitioner even knows that this application is being made or that he is now a *bona fide* beneficial, owner of Hoe stock.

I

The petition should be denied because the writ prayed for would not issue to the court of last resort of the State of New York as required by Section 237 of the Judicial Code.

The jurisdictional statute permitting this court to review state court cases either by appeal or by certiorari relates only to final judgments and decrees rendered "by the highest court of the state in which a decision can be had" (28 U. S. C. 1257).

Section 588 of the New York Civil Practice Act provides:

> "APPEAL AS OF RIGHT.
>
> Appeal to the court of appeals as of right lies only
>
> 1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that
>
> (a) there be directly involved the construction of the constitution of the state or of the United States;"

On April 25, 1951 the Appellate Division unanimously affirmed the judgment of the trial court (*Katz* v. *Hoe*, 278

App. Div. 766); and copy of the judgment entered upon such affirmance, with notice of entry, was duly served on petitioner's attorney on April 27, 1951. Assuming, *arguendo,* that the constitutional and Federal questions now sought to be asserted by petitioner were properly reserved, he had an absolute right to appeal directly to the Court of Appeals. He took no such appeal and the time so to do has expired. Instead, he applied to the Court of Appeals for leave to appeal and that application was denied on July 11, 1951. Petitioner thereby unequivocally conceded that there is no constitutional question in the case; but, in any event, it is clear that he did not exhaust his remedy before the state court and for that reason this court is without jurisdiction.

In *Southern Electric Co.* v. *Beha,* 269 U. S. 186, 70 L. Ed. 227 this precise question was raised and decided. There it was held that a writ of error to review the decision of the appellate division, which involved denial of a right claimed under the Federal Constitution, will be dismissed where under the state law (N. Y.) an appeal from the denial lay directly to the Court of Appeals, but instead of taking such appeal, petitioner unsuccessfully attempted to have the appellate division certify a question to the Court of Appeals. Mr. Chief Justice TAFT, writing for the unanimous court, said (p. 188):

> "The disallowance was approved by the supreme court and on appeal was taken to the appellate division which affirmed the order of the special term. The claimant then moved for leave to appeal to the court of appeals, and that motion was denied by the appellate division. It is from the order of the appellate division affirming the report of the superintendent of insurance disallowing the claim that this writ of error is taken."

The court stated that the petitioner had properly maintained both in the lower court and in the appellate division

that disallowance of the claim was a denial of full faith and credit, in violation of article 4, section 1 of the Federal Constitution, and that section 63 of the New York Insurance Law was in violation of the 14th Amendment.

Respondent made a motion to dismiss the writ of error on the ground "that it has not issued to the court of last resort of the state of New York as required by section 237 of the Judicial Code". The court said (p. 189):

> "By the first paragraph of section 588 of the Civil Practice Act of New York, an appeal to the court of appeals may be taken as of right from a judgment or order entered upon the decision of the appellate division which finally determines an action or special proceeding where is directly involved the construction of the Constitution of the state or of the United States. In this case there is directly involved the construction of the Constitution of the United States, and therefore it would seem that an appeal could have been taken from the appellate division as of right to the court of appeals, but this was not done. Instead, application was made to the appellate division to certify that a question of law was involved in the case which ought to be reviewed by the court of appeals, and that certificate the appellate division declined."

The court pointed out that in another phase of the same case a direct appeal had been taken from the appellate division to the court of appeals under the first paragraph of section 588 of the Civil Practice Act and said (p. 190):

> "This was not by permission of the appellate division and must therefore have been found by the court of appeals to be within the fourth paragraph of section 588, an order upon a decision of the appellate division 'finally determining an action or special proceeding.' This clearly shows that in the view of the court of appeals of New York if the order of disallowance in this case involved a Federal

constitutional question as it did on this record, it was directly appealable to that court from the appellate division under the first paragraph of section 588. The claimant has failed to make proper application to the state court of final resort and for that reason the writ must be dismissed."

II

Precisely the same Federal questions sought to be raised now have all been adjudicated adversely to petitioner in a suit brought by him, during the pendency of the case at bar, in the Federal court; and the decision of that court is *res judicata.*

During the pendency of the case at bar, petitioner surreptitiously brought a second suit against the same parties for identically the same relief in the United States District Court for the Southern District of New York. His insatiable appetite for litigation and his desire to harass and annoy would not permit him to await the decision in the state court where he had represented that "irreparable damage" would follow unless that court granted an injunction.

The trial judge in this case said (R. 650):

> "On the day the trial in this case was concluded and when the matter was *sub judice* (the court awaiting the briefs of the litigants), plaintiff applied to the United States District Court for the Southern District of New York for substantially the same relief he asks in this litigation."

The court commented upon the fact that "common courtesy and proper advocacy dictate that it should have been presented to this court, particularly as the issues here had not been finally submitted."

The alleged Federal questions now urged by petitioner and enumerated at pages 6 and 7 of the petition are identically the same as those urged before the Federal court. There it was argued that the consolidation violates the plan of reorganization approved by the Federal court in the Hoe 77B proceedings of 1935—or, to state it differently, that the certificate of incorporation, as amended and approved by that court when the debtor was discharged in 1935, immutably defines the rights of the stockholders; and cannot later be amended or altered in any respect or by any means. To state the claim is to answer it.

The petitioner also contended that the proposed consolidation was in violation of his right to vote cumulatively and his other "vested rights" and that *Stoll* v. *Gottlieb*, 305 U. S. 165 had been ignored. All of these contentions were dismissed and the judgment of the Federal court is, of course, *res judicata*.

The District court dismissed the petition on November 6, 1950, stating (*In re Hoe & Co., Inc.*, 93 F. Supp. 762):

> "A less worthy appeal to the court's equity power is impossible to imagine."

The opinion follows:

> "The proceedings for the reorganization of the debtor were terminated by order of July 10, 1935. It was thereby adjudged that the debtor be discharged and that it be revested with its properties. The petitioner concededly was not a stockholder at the time of the reorganization proceedings. He purchased his 500 shares on December 23, 1949, just about the time the debtor was about to effect a consolidation pursuant to the New York Stock Corporation Law, Mck. Consol. Laws, c 59. The petitioner undertook to prevent the consolidation. He seemed to realize, correctly, that his recourse had to be to the state court to seek injunction against possible violation of the local law, rather than to seek relief here

under the theory he now advances. He did institute an action in New York. A temporary injunction was there denied and, after a prompt trial, judgment was entered against him. While the matter was awaiting decision by Mr. Justice Cohalan, and without advising him, this petition was filed here. It seeks the identical relief prayed for in the state court action. The only thing different here is the theory. It is here claimed that petitioner is proceeding under the 'reserved jurisdiction' of the bankruptcy court, to enjoin alleged disobedience of the reorganization plan.

"It is well settled that the bankruptcy court should not and indeed cannot indefinitely keep 'leading strings'[1] on or be a 'nurse'[2] to reorganized concerns. This reorganized debtor was in 1935 sent 'out into the state as fully subject to state law as though the court had had nothing to do with its creation.'[3] The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court.[4] A less worthy appeal to the court's equity power is impossible to imagine.

The petition for injunction is in all respects denied."

The petitioner appealed and his appeal was dismissed on January 12, 1951; and rehearing denied on February 7, 1951 (*In re R. Hoe & Co., Inc.*, 186 F. 2d 716).

The order of the District court was duly served on petitioner's attorney on November 15, 1950; the order of the United States Court of Appeals dismissing the appeal on January 15, 1951; and the order on mandate, on February 14, 1951.

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1. *In re Flatbush Ave.-Nevins St. Corp.*, 2 Cir., 133 F. 2d. 760.

2. *North American Car Corp.* v. *Peerless W. & V. Mach. Corp.*, 2 Cir., 143 F. 2d 938.

3. *In re Ambassador Hotel Corp.*, 2 Cir., 124 F. 2d 435, 437.

4. *Davega-City Radio, Inc.* v. *Boland*, D. C. S. D. N. Y., 23 F. Supp. 969, 970.

Petitioner did not appeal to this court and did not file a petition for a writ of certiorari and his time so to do has expired. In his petition for rehearing, verified January 15, 1951, petitioner states: "If such is in fact the case (if the appeal was dismissed as moot) then the record made in this court is adequate to have the United States Supreme Court pass upon the matter by writ of certiorari".

Having abandoned any rights which he might have had to petition this court for certiorari, the ruling of the district court on the alleged Federal questions now sought to be presented became the law of the case and petitioner cannot, by his petition in the case at bar, accomplish by indirection what he cannot do directly, *i.e.*, overthrow or reverse the judgment of the district court which has become final. He cannot now relitigate questions already adjudicated.

It is clear that the foregoing decisions have resulted in conclusive and final adjudication of the alleged Federal questions now sought to be presented, adversely to petitioner. If viewed, however, as a matter of first impression, it is clear that petitioner's contention is utterly devoid of merit.

The plan of readjustment in the Federal Court was effected by the filing of the certificate of amendment to the certificate of incorporation of the debtor in the form approved by the order of the district court dated May 15, 1935 (R. 465); by paragraph 6 of the order of said court, dated June 25, 1935 (R. 449), the court found that said filing had been consented to by the required votes of Class A and common stockholders and that the same had been duly filed as required by law; paragraph 17 of said order provided (R. 460):

> "This court finds that all of the proceedings of the debtor since the entry of the order of this court

confirming said plan had been in conformity with the plan and with said order and with the requirements of section 77 B.

"To the extent, if any, that the instruments, steps or proceedings approved or authorized by this order or any order previously entered herein shall involve or result in any changes or modifications in the plan, such changes and modifications are hereby approved; and none of such modifications and changes, in the opinion of the court, and the court hereby finds and determines that none of such changes and modifications, is materially adverse to the interest of any creditor or stockholder."

By said order it was adjudged that on and after July 1, 1935 "the possession by the debtor of its assets and operation by it of its business shall be free from the control of this court, except insofar as may be necessary or proper in order to complete the carrying out and putting into effect of the Plan" (R. 454).

By order dated July 10, 1935, the court adjudged that the plan had been consummated and that the proceedings for the reorganization of the debtor had terminated; and said order, among other things, provided:

"2. The Debtor is hereby discharged from its debts and liabilities, and all rights and interests of its stockholders are terminated, except as provided in said Plan or as reserved by order of this Court, dated June 25, 1935, revesting in the Debtor, the assets and properties held by Irving Trust Company, as Trustee of the estate of the Debtor."

The Certificate of Increase of Shares under Section 36 (R. 466) became the company's charter "as fully subject to state laws as though the court had had nothing to do with its creation" (*In Re Ambassador Hotel Corp.*, 2 Cir. 124 F. 2d 435, 437). That certificate provided that the common

stock should be "specifically excluded from voting in any proceeding for

> establishing priorities or creating preferences among the several classes of stock pursuant to Section 36;
>
> consolidation pursuant to Section 86 of the Stock Corporation Law * * *."

The above provisions remained unchanged until the consolidation here under review.

III

The judgment of the lower court rests upon non-Federal grounds which are adequate to support it.

The suit was brought to enjoin a consolidation, under section 86 of the New York Stock Corporation Law, of R. Hoe & Co., Inc. with a subsidiary. The complaint alleges that the proposed consolidation was "fraudulent" and "illegal" in that it "denied the common stockholders the right to vote on the consolidation"; that it was "unfair" to the common stockholders in that it failed to accord to them a proper share of the equity; that the consolidation was the result of "an unlawful and fraudulent scheme, plan and conspiracy"; and that it constituted a violation of the orders of the Federal court in the plan of reorganization of 1935 (R. 9-16).

These allegations were denied by defendants (R. 30, 31).

The case proceeded to trial upon the issues thus framed and the trial court's decision is based upon the following non-Federal grounds (R. 651-654):

1. There was no proof of fraud;

2. Under the terms of the company's charter, "the present common stockholders have no right to vote on the proposed consolidation";

3. There was no "ruse" or subterfuge "by means of which the provisions of section 35 are being avoided";

4. There was a complete failure of proof as to any unfairness to the common stock;

5. That it is settled law of this state that "in the absence of a very plain showing of either fraud or improvidence" the court "will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature".

6. That under the law of New York (section 21, Stock Corporation Law) plaintiffs have an adequate remedy at law in the form of appraisal.

This court has made it crystal clear that "the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the National Constitution." *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 535, 85 L. Ed. 322, 325.

In *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 80 L. Ed. 158 this court stated that it would not attempt to decide whether a Federal question was involved in the determination of the lower court, in respect of which the parties sharply differed, and then proceeded to hold that where the non-Federal ground of the decision was adequate to support the judgment, this Court lacks jurisdiction, saying (p. 210):

> "We do not attempt to settle the dispute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, 20 L.

ed. 635, 637, and has been reiterated in a long line of cases since that time." (Citing numerous authorities.)

The opinion continued (p. 211):

> "The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts and the federal question in respect of their validity under the Anti-trust Act were clearly independent of one another. See *Allen* v. *Southern P. R. Co.*, 173 U. S. 479, 489-492, 43 L. ed. 775, 778, 779, 19 S. Ct. 518. The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 S. Ct. 340; *Chapman* v. *Goodnow* (Chapman v. Crane), 123 U. S. 540, 548, 31 L. ed. 236, 238, 8 S. Ct. 211. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.
>
> Writ dismissed for want of jurisdiction."

In *Wood* v. *Cheeseborough*, 228 U. S. 672, 57 L. Ed. 1018, the court, overruling a contention that if there be questions both of Federal and local law in a case, this court may entertain jurisdiction, said (p. 677):

> "This is in effect saying that in all cases, if there be local and federal questions, we may pass upon both and reverse the state court upon both. And yet, it is well established that if there be federal and non-federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court."

In *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. ed. 1229, the court held that where a statutory consolidation is attacked on the ground of fraud, when such

charge fails, "the asserted constitutional question ought not to be considered", saying (p. 411):

> "Upon this conclusion the judgment of the district court might well be affirmed, for the reason that where fraud is charged in a bill or set up in an answer, and is denied, the party making the charge will be confined to that issue, and also for the reason that where the claimed constitutional question on which a direct appeal to this court is based is pleaded as resulting from the carrying into effect of a fraudulent scheme, when such charge of fraud fails, the asserted constitutional question ought not to be considered."

IV

No Federal questions are saved for review; and petitioner's failure to urge the same before the trial court, the Appellate Division and the Court of Appeals constitutes a waiver and an abandonment thereof.

The "three principal Federal questions" asserted by petitioner are stated at pages 6 and 7 of the petition as follows:

> "1. *Deprivation of cumulative and other voting rights.*
>
> Whether it is a deprivation of the property of the common stockholders of Hoe in violation of the Fifth and Fourteenth amendments of the United States Constitution to disfranchise them of and abrogate their right to cumulative voting in the election of directors and other voting rights in *contravention of the explicit provisions* of their stock certificates and Hoe's corporate charter?"

As we have shown, there has been no deprivation of the rights of the common stock to vote "in contravention of the explicit provisions of their stock certificates and Hoe's corporate charter" or otherwise. On the contrary,

the common stock renounced, waived and abandoned its right to vote on consolidation and the company's charter "specifically excluded" it from such voting rights (R. 506, 507).

> "2. *Collateral modification of bankruptcy decrees and plans of reorganization by State courts.*
>
> Whether the decrees of the United States Districts Court entered in the bankruptcy proceeding of Hoe (R. 430-466) and the plan of readjustment and certificate of incorporation approved thereby are subject to collateral attack or modification by judicial or administrative authorities of the State of New York by permitting the filing of a certificate of consolidation which amends the certificate of incorporation in violation of the terms of said decrees?"

No decree of the Federal court has been "subject to collateral attack or modification by judicial or administrative authorities of the State of New York". There has been no attempt by any one to challenge the validity of any Federal court decrees and when this identical question was presented by this petitioner to the Federal courts, it was overruled (*In re Hoe & Co., Inc.*, 93 F. Supp. 762, appeal dismissed, 186 F. 2d 716).

> "3. *Res adjudicata of bankruptcy decrees.*
>
> Whether the District Court bankruptcy decrees and the Hoe Plan of Readjustment approved thereby are judgments *in rem* which the Court of the State of New York must recognize under Federal Law under the doctrine of *Stoll* v. *Gottlieb*, 305 U. S. 165?"

No one has challenged *Stoll* v. *Gottlieb*. It has no more application to this case than the Rule in *Shelley's* case.

These alleged Federal questions simply do not exist. As Pooh-Bah remarked on another occasion, this "is merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative".

These questions were not presented to the trial court, the Appellate Division or the Court of Appeals. It is true that the complaint alleges that the stockholders' "meeting" was in violation of "the Constitution of the United States of America, and amendments Fifth and Fourteenth thereof" (R. 15), but except for this statement, no argument was advanced in briefs or oral argument, before the trial court or the two appellate courts.

Petitioner asserts that the order denying his motion for a new trial raises the question. This is not the fact; and the attempt to comply with the rules of this court at pages 8-10 of the petition is wholly inadequate.

No certificate has been obtained from the highest state court to the effect that a Federal question was raised and decided. The decision passed on non-Federal grounds.

Under the decisions of the courts of New York, under these circumstances, a litigant is held to have waived and abandoned points not urged on appeal (CARDOZO, *J.* in *People* v. *Journal,* 213 N. Y. 1, 6; *Galloway* v. *Erie,* 116 App. Div. 777, aff'd on opinion below, 192 N. Y. 545).

In *Nicholson* v. *Greely Square Hotel,* 227 N. Y. 345, the court said (p. 349):

> "Even now there is no mention of the defense either in the brief or in the oral argument of counsel for the defendant. We hold it abandoned."

In *Galloway* v. *Erie, supra,* it is said (p. 780):

> "But the learned counsel for the defendant has waived this error by not mentioning it in his oral argument nor in his brief. We are therefore not called upon to consider whether it be substantial. In the same way he has waived the exceptions to the refusals to charge his requests in respect of the violation of section 663 of the Penal Code, and the charge of the plaintiff's request on that head. They

> may be serious, but it is not for us to seek out and enter into errors which the learned counsel for the defendant does not claim to be aggrieved by."

This court has held repeatedly that Federal questions if relied upon here, must not only be properly raised in the first instance at trial term but preserved by argument and brief in the appellate courts; otherwise they will be deemed abandoned.

In *Herndon* v. *Georgia,* 295 U. S. 441, 79 L. Ed. 1530 the indictment was attacked upon the ground that the statute was "in violation of the Constitution of the United States". In holding that the petitioner had not properly raised the Federal question for review or preserved it in the appellate courts, the court said (p. 442):

> "We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court.
>
> "It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation 'of the Constitution of the United States', and that this contention was overruled. But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exception *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the state supreme court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determnation of the state court is conclusive here."

In *Wilson* v. *Cook,* 327 U. S. 474, 90 L. Ed. 793, it is said (p. 481):

"As the record does not show that the pliantiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States."

The opinion continues (p. 483):

"But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely 'an enlargement' of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey* v. *Des Moines,* 173 U. S. 193, 197, 198, 43 L. ed. 665, 666, 19 Ct. Ct. 379. We are therefore not free to consider it.

"In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented.' *New York ex rel. Cohn* v. *Graves,* 300 US 308, 317, 81 L ed 666, 673, 57 S Ct 466, 108 ALR 721, and cases cited."

In *Hulbert* v. *Chicago,* 202 U. S. 275, 50 L. Ed. 1026, the court said (p. 280):

"The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the supreme

court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States."

Petitioner states "that the trial and the Appellate courts below based their decisions on the alleged grounds of state law in complete evasion of the foregoing Federal questions for the purpose of defeating review by this court as petitioner contends" (p. 7); that the ruling by the state courts to the effect that the common stockholder had no right to vote on this consolidation is "an arbitrary device to prevent review by this court" (p. 23); and that the mere citation of *Anderson* v. *International Minerals & Chemical Co.*, 295 N. Y. 343 "may properly be regarded as an evasion of a decision on a Federal question presented to it" (p. 26).

We challenge this utterly unfair and irresponsible attack upon the integrity of the courts of the State of New York. There is no evidence to justify it.

V

The consolidation having been fully consummated, securities of the value of upward of ten million dollars issued thereunder, and the rights of the purchasers for value thereof having become vested, the questions now urged are moot and for that reason the petition should be denied.

On November 29, 1950, after the Appellate Division had unanimously denied petitioner's motion for a stay pending appeal from a judgment dismissing the complaint on the merits, said consolidation was duly consummated, the certificate of consolidation filed in the office of the Department of State of the State of New York; the new securities have been issued; and stockholders owing the old securities have exchanged the same, in large part, for the new.

Dividends have been declared and paid on the new securities on January 15th, April 15th, July 15th, and October 15th, 1951.

The new Class A stock has been fully listed on the New York Curb Exchange and bought, sold and traded in on said exchange. The new common stock has been bought, sold and traded in on the over-the-counter market. Rights of the holders of these securties have become vested. There are approximately 2500 stockholders of this company and they are located in virtually every state of the United States and some reside in foreign countries. There is no subject matter on which any injunction which this court might issue, could operate.

The *status quo* cannot be restored and it would be impossible for respondent to comply with any order requiring it to do so. There is no practical way in which respondent could recover shares of stock which have already been issued pursuant to the consolidation or dividends paid on the new stock, even if directed so to do by this court. The suit was brought to obtain an injunction. The Appellate Division so found, saying: "The suit was instituted primarily for an injunction to restrain a corporate consolidation". Attorneys for petitioner, in seeking interim stays have repeatedly sworn that the sole purpose of the suit was to obtain an injunction; that "denial of the stay will destroy the purpose of the *entire* litigation"; that such denial would "render the litigation nugatory"; and would "nullify any judgment" which petitioner might obtain.

It is clear, therefore, that the points urged are moot and that this court is being called upon to perform a futile and meaningless act, *i.e.*, to restrain Hoe from doing that which has already been accomplished. In *1130 President Street Corp.* v. *Bolton Realty Corp.*, 300 N. Y. 63, it is said (p. 69):

> "Injunctive relief should be addressed only to acts which are 'threatened or imminent' (see *People* v. *Canal Board*, 55 N. Y. 390, 395)."

In the case at bar no act is " threatened or imminent".

It is axiomatic that courts do not pass judgment upon causes which are academic or moot at the inception of the suit or which have thereafter become so.

In *Brownlow* v. *Schwartz*, 261 U. S. 216, 67 L. Ed. 620, petitioner filed a petition praying for a writ of mandamus against respondent requiring him to issue a permit to erect a building for a business purpose on a lot situated on a residence street in Washington. The trial court dismissed the petition. On appeal, the judgment was on February 7, 1921 reversed and the cause remanded with directions to issue the writ as prayed. After the decision of the Court of Appeals and before the allowance of the writ of error the permit was issued and the building erected.

This court dismissed the writ of error, saying (p. 217):

> "It thus appears that there is now no actual controversy between the parties,—no issue on the merits which this court can properly decide. The case has become moot for two reasons: (1) Because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued, and the building to which it related has been completed; and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.
>
> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain" (Citing many authorities).

The opinion continues (p. 218):

> "We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co.* v. *Kansas,* 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 397. The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance."

It is now belatedly contended that the prayer of the complaint includes a demand for a judgment declaring the stockholders' "meeting" unconstitutional (R. 15). It appears from the foregoing, we submit, that the essential character of the suit is one for an injunction, the petitioner has so admitted and the Appellate Division has so held. But even if the suit be viewed as one for a declaratory judgment, the petition should be denied.

In *Somberg* v. *Somberg,* 263 N. Y. 1, it is said (pp. 4-5):

> "A declaratory judgment may be resorted to only when circumstances render it 'useful and necessary'; where it will 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.' (*James* v. *Alderton Dock Yards,* 256 N. Y. 298, 305.)"

The rule in the Federal courts is precisely the same. The statute (28 U. S. C. A. 2201) limits its application to cases of "actual controversy". In *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240-241, Mr. Chief Justice HUGHES, writing for the court, said:

> "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."

Apparently petitioner concedes that "it is impossible to unscramble the omelet," (p. 36); but suggests that this court award damages. The complaint includes no prayer

for such relief (R. 15). It is, as the Appellate Division has held, a suit "for an injunction to restrain a corporate consolidation" and nothing more.

VI

This consolidation is authorized by the Stock Corporation law.

Section 86 of the Stock Corporation Law provides:

> "Any two or more domestic business corporations may be consolidated into a single corporation, which may be either a new corporation or any one of the constituent corporations * * *" by the filing of a proper certificate.

It is significant that the Legislature, with knowledge that many consolidations have taken place between a parent and its subsidiary, did not qualify or limit the words "any two or more domestic business corporations". If it had intended to outlaw consolidation with a subsidiary all that would have been required was to add the phrase, "except by a corporation with its subsidiary". In fact, in the lower courts, petitioner conceded that consolidation with a wholly owned subsidiary "is entirely legal".

Our section 86 is practically identical with section 59 of the Delaware statute providing for mergers. The Supreme Court of Delaware construed that statute in *Federal United Corp.* v. *Havender,* 11 A. 2d 331 decided in 1940. It is the leading case in the United States on the subject and is directly in point. In a comprehensive opinion, citing authorities from many states, the Supreme Court held valid under section 59 a merger by one corporation with its wholly owned, inactive subsidiary, the merger being designed for the sole purpose of eliminating accumulated dividends on preferred stock, an objective which could not be accomplished by charter amendment. There the court said:

"The shareholder has notice that the corporation whose shares he has acquired may be merged with another corporation if the required majority of the shareholders agree. He is informed that the merger agreement may prescribe the terms and conditions of the merger, the mode of carrying it into effect, and the manner of converting the shares of the constituent corporations into shares of the resulting corporation. * * *

"Looking to the law which is a part of the corporate charter, and, therefore, a part of the shareholders' contract, he has not been deceived nor lulled into the belief that the right to such dividends is firm and stable. On the contrary, his contract has informed him that the right is defeasible; and with that knowledge the stock was acquired."

In *Beechwood Securities* v. *Associated Oil,* 9 Cir., 104 F. 2d 537, it is said (p. 540):

"No fraud warranting the setting aside of a consolidation is committed on the shareholder when he receives the exact treatment the statute advised him was his due when he invested in the shares."

See, also:

Hottenstein v. *York Ice Machinery Co.,* 3 Cir., 136 F. 2d 944;
Hubbard v. *Jones & McLaughlin,* 42 F. Supp. 432;
Porges v. *Vadsco Sales Corp.,* 32 A. 2d 148.

It is a cardinal rule of statutory construction that the courts will give to a statute, where the language is plain and understandable, the exact meaning conveyed by the language, adding nothing and subtracting nothing. (*Cooper-Snell* v. *State,* 230 N. Y. 249; *Tompkins* v. *Hunter,* 149 N. Y. 117, 122.)

Plaintiff Failed to Produce a Scintilla of Evidence of Fraud

Petitioner asserts as one of his principal grounds of fraud that the plan is inequitable and unfair to the common stock. The same contention was asserted in all of the foregoing cases and overruled. It was conclusively answered in *Zobel* v. *American Locomotive Co.*, 182 Misc. 323, (p. 328):

> "True, plaintiffs say that the plan is so unfair to the preferred stockholders, in favor of the common stockholders, that it amounts to fraud, but, as has been indicated above, there is here nothing more than an emphatic way of saying that as a matter of business judgment plaintiffs would rather keep what they now have. No actual bad faith is shown, and neither is there such unfairness, if any, as would justify an inference of fraud."

Plaintiff also contends that the organization of the subsidiary was a "blind" or "ruse". The trial judge held (R. 653): "On the submitted evidence, this court is unwilling to hold that the consolidation is a ruse by means of which the provisions of section 35 are being avoided."

Plaintiff's own evidence completely demolishes this contention. He called to the stand Hoe's attorney, who had been a director since 1937 (R. 69). He testified, *on direct*, that the organization of the subsidiary had been under consideration for over a year prior to July, 1950 (R. 80); and that one of the purposes of organizing the subsidiary was "more effectively to handle the export business" (R. 80). He continued (R. 81):

> "I have long discussed with Mr. Auer, the president, and other of our operating officials the organization of a subsidiary to handle that business in order that the profit of that supplementary equipment might inure to the benefit of R. Hoe & Co., Inc.

and not to the benefit of the agent. I thought that that work could be more effectively handled in that fashion. Another reason was that we are agents, or rather, Hoe is the agent of an English firm, R. W. Crabtree & Sons, Ltd., manufacturers of printing presses and other graphic arts equipment in London and Leeds. We sell goods of their manufacture and I thought it would minimize the friction between ourselves and our competitors and ourselves and labor unions in selling English-made goods in view of the fact that the labor rates in England are far lower than ours. It seemed to me better to localize the operation in another company. The subject was discussed also, of incentive arrangements which could better be made with a subsidiary than with R. Hoe & Co., Inc., in so far as the managers of the subsidiary were concerned."

He also testified that another purpose was to afford a legal means of effecting a recapitalization through a consolidation (R. 80); and that if, as the result of the consolidation the subsidiary ceased to exist, he would advise that another be organized for the purpose of carrying out the purposes of its organization (R. 77).

It is common knowledge that many manufacturing companies hold their securities, operate their real estate, or conduct their foreign business, through the medium of subsidiaries.

Plaintiff asserts that this evidence is incredible, and that, in truth, there was no legitimate purpose for the organization of the subsidiary.

This testimony was unimpeached and undenied and it is elementary law that plaintiff is bound by the testimony of this witness whom he called and thereby certified to the court as worthy of credence. (*Hanrahan* v. *New York Edison Co.*, 238 N. Y. 194, 197.)

For the same reason, plaintiff is bound by the testimony of his witnesses, Kadel (R. 219) and Littleton (R.

256). In addition defendants called to the witness stand the following: Auer (R. 337, 338), Barr (R. 359-363), Brown (R. 305, 310, 320) and Tillinghast (R. 375, 376); and plaintiff stipulated that Canady, Munzert and Foster, who could not be produced, would have testified to the same effect, if called (R. 387).

All of these witnesses testified, in substance and effect, that they resorted to no trick, device or subterfuge; that they entered into no conspiracy to deprive the common stock of a vote or in any wise adversely to affect it; and that they voted for the consolidation in the sincere conviction that it was in the best interests of the corporation and all of its stockholders, including the common stock.

This unimpeached and uncontradicted evidence "cannot be disregarded by court or jury" and "must be believed for judicial purposes" (*People* v. *Tuczkewitz,* 149 N. Y. 240, 251).

The brief of petitioner proceeds upon a fundamentally false premsie, *i. e.*, that the consolidation was a device for "depriving the common stock of the right to vote". Nothing could be further from the truth. This stock effectually renounced, waived and abandoned its right to vote on a consolidation under section 86, or to amend, under section 36 (now 35), and on the basis of such renunciation and consent the Federal court, in 1935, decreed that its voting rights be so limited. Ignoring this essential fact, petitioner proceeds to argue that respondents have "deprived the common stock of its right to vote"—a postulate based upon a fiction.

Twice plaintiff and his attorney have sworn unequivocably that, except to elect two directors and to vote on dissolution, "the common stockholders have no other voting rights of any kind whatever" (R. 647). The certificate of incorporation, as amended, plainly so stated and the trial

judge has so ruled (R. 652, 653). Petitioner now argues that he has been deprived of a right which he has sworn he does not possess.

The Charge That the Consolidation Is Inequitable and Unfair to the Common Stock Is Irrelevant and Presents No Justiciable Question

The problem before this court is not whether experts employed by petitioner may testify that the plan of recapitalization is fair or unfair or whether the court regards it as the best possible plan. This court is not concerned with that problem and will not substitute its own judgment for that of the directors and officers of the company.

The trial court so ruled (R. 653):

> "It should always be borne in mind in these cases that the court, in the absence of a very plain showing of either fraud or improvidence, will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature. (*Zobel* v. *American Locomotive Company*, 182 Misc. 323; *Turner* v. *The American Metal Company*, 268 App. Div. 239.)"

See, also:

Liebschutz v. *Schaffer Stores Co.*, 276 App. Div. 1, 6;
Zobel v. *American Locomotive Co.*, 182 Misc. 323, 325;
Gamble v. *Queens County Water Co.*, 123 N. Y. 91, 99;
Turner v. *American Metal Co.*, 268 App. Div. 239, 259 (appeal dismissed 295 N. Y. 822).

Petitioner asserts that the consolidation is a disguise for a recapitalization. This same contention has been ad-

vanced and overruled by every court dealing with the problem. In *Zobel* v. *American Locomotive,* 182 Misc. 323, the court states (p. 327):

> "They also urge that a consolidation with wholly owned subsidiaries is not in reality a consolidation but a mere misnomer for a recapitalization. There again, the answer is that the Legislature has authorized consolidation. Identically the same contentions have been repeatedly rejected in other States under identical statutes."

In other words, petitioner's position comes down to this simple issue: This company could recapitalize in two ways, either by consolidation under section 86, where, concededly, the common stock has no right to vote, or by amendment of the charter under section 35 where, he claims, the stock has the right to vote. The criticism is that management chose the alternative, which petitioner does not prefer: *ergo,* fraud. Respondents claim that it not only was the right, but the unmistakable duty, of the directors to select that course which recognized and gave effect to the equities of the two classes of stock.

In *Havender* (11 A. 2d 331) and *Hottenstein* (136 F. 2d 944) it has been held that even though a charter amendment to cut off dividends may be unauthorized or illegal, a merger or consolidation bringing about the same result is lawful. These cases recognize the essential difference between a recapitalization by amending the charter and by consolidation. This distinction was also plainly recognized in *Anderson* v. *International Minerals & Chemical Corp.,* 295 N. Y. 343. There the court said (p. 349):

> "In this case we are dealing with the provisions of the New York Stock Corporation Law having to do with merger and consolidation (art. 8). This provision differs in language, purpose and subject matter from Article 4 relating to the reclassification

of shares under which the cases arose upon which plaintiff relies."

Every consolidation brings about a recapitalization. Section 86 provides that the certificate of consolidation shall set forth the name of the new company, its purposes, a complete restatement of the provisions concerning its authorized capital stock, the location of the company, its duration, the number of directors, etc., etc.—in fact, every statement which must be set forth in a certificate of incorporation filed under section 5, except those which are by their nature inapplicable, such as the names and addresses of the incorporators. Obviously, the intention is to create a new certificate of incorporation for the consolidated corporation, whether it be a new entity or one of the constituent corporations.

To say that the proposed consolidation must be held invalid because it resulted in a recapitalization of Hoe, is to ignore the essential character of a consolidation as well as the plain intent of the statute.

VII

The doctrine of comparative equities requires denial of the petition.

Katz stands alone. When he bought his 500 shares of common stock for about $4,000, was he investing or was he buying a lawsuit? The vast body of stockholders whom he pretends to represent will have nothing to do with this suit. They are satisfied with the recapitalization.

The unanimous Appellate Division said that "a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action joined only by

defendant Martin, another common stockholder and also a director". Martin has not joined in this petition.

Katz' bad faith and efforts at harassment and obstruction are evidenced by his tricky attempt to defeat and evade the judgment of the very court whose equity powers he invoked, by resort to the Federal Court, during the trial of this case.

In *Block* v. *Propp*, 174 Misc. 122, the Court said of a stockholder's suit (p. 124):

> "* * * inasmuch as the stock of the corporation was publicly traded in on the securities' markets, there was a public interest involved."

The court said in *Treadwell* v. *United Verde Copper Co.*, 134 App. Div. 394, 399:

> "The action is in equity and its determination must be governed by equitable principles, having regard not to the interest of the plaintiff alone, but to all of the parties interested."

Equity will not intervene where the interests of innocent parties can best be protected by remitting plaintiff to his legal or statutory remedies; and this principle applies even in situations where a minority stockholder had no remedy of appraisal.

In *Drake* v. *New York Suburban Water Co.*, 36 App. Div. 275, a reorganization was effected by foreclosure proceedings. There was no remedy of appraisal applicable at the time. Although the transaction was found to be invalid, the Appellate Division reversed a judgment setting it aside, CULLEN, *J.*, writing:

> "The plaintiff is the only stockholder who seeks to avoid the transactions of which he complains. He is appealing to a court of equity, whose first rule is that he who seeks equity must do equity. Here the

> holders of a million and a half of bonds are interested in having the foreclosure sale stand. * * * If this foreclosure suit is set aside, and the judgment opened, the parties will be remitted to a litigation that may last for years before it is finally composed. The expense of such a litigation would be many times the value of the plaintiff's interest. By enforcing such a litigation, the plaintiff can subject the parties to this expense, or compel them to buy him out at an exorbitant price. We do not think he should be allowed to take such a course. * * * The plaintiff or his predecessor in title evidently regarded it as more profitable not to defend himself against the alleged wrongs upon him during the time of their commission, but to await their infliction, and thereafter bring a suit. When he stands simply on his legal rights, and proceeds in a court of law, he may be entitled to the benefit of that course, however much wrong it may inflict on innocent parties; but when he finds himself compelled to appeal to equity for relief a different rule should prevail. He should be entitled merely to full indemnity."

In *Treadwell* v. *United Verde*, 134 App. Div. 394, the court dismissed a minority stockholder's complaint upon the authority of the *Drake* case which it quoted with approval (p. 401). There the stockholder obtained at Special Term an *ex parte* stay which was vacated when the motion came on for hearing, but, on appeal the order was reversed and the stay granted. In the interval, however, the reorganization had been consummated. On the trial, the court set it aside as fraudulent and illegal. Upon appeal, the judgment was reversed.

Mr. Justice McLaughlin, writing for a unanimous court, said (p. 400):

> "It then appeared that all of the stockholders, except the plaintiff, who held about a one four-thousandth part of the stock, were entirely satisfied and had exchanged their stock in accordance with the

plan of reorganization. The dissolution having been accomplished, the sale having been made, and about three thousand nine hundred and ninety-nine four-thousandths of the stockholders satisfied with what had been done, it would be unjust and inequitable to them, at the behest of one holding only about one four-thousandth, to wipe out all that had been accomplished and destroy a going and profitable concern by ordering a resale of the property. *The plaintiff's position in now insisting upon such sale, taking into consideration its necessary result and the expense attending the same, does not commend itself to and cannot receive the sanction of a court of equity.''* (Emphasis supplied.)

It would be a shocking denial of justice, we submit, to permit this plaintiff, owning stock for which he paid not more than $4,000, to frustrate and defeat this recapitalization with which the vast majority of stockholders are entirely satisfied. It would be impossible for this court effectively to compel the repayment of dividends by stockholders in distant States, to require them to reconvert their securities, and Hoe to do all the manifold, burdensome and, in fact, impossible acts necessary to reinstate the *status quo*. Katz will not be harmed. The right of appraisal was at all times available to him. He can always exchange his stock and obtain the new stock and accrued dividends; or he can sue at law if he be so advised.

VIII

Petitioner has an adequate remedy at law; appraisal constitutes the exclusive remedy of a stockholder not wishing to participate in the plan.

In the application for a temporary injunction (*Katz* v. *Hoe*, 99 N. Y. Supp. 899, aff'd 277 App. Div. 966), the court correctly ruled that the right of appraisal "eliminates any contention of irreparable injury and lack of an adequate remedy at law". The trial judge also so held (R. 654).

It is, of course, axiomatic that before plaintiff can succeed, he must prove, in this suit in equity, that he has no adequate remedy at law. He expressly recognizes this necessity in his pleading (R. 15).

Plaintiff, in substance and effect, says to this court:

> We know that on an appraisal we will receive in cash every penny to which we are entitled—the full and fair equivalent of each and every right surrendered, including future prospects of increase on our investment. Nevertheless, we will not accept this fair treatment because we want to control the company and exercise the veto on any plan of recapitalization which management proposes. It is no longer a question with us of full, fair and complete compensation for every right we possess, we claim the veto power.

What plaintiff wants is to "compel the majority to buy him out on his own terms". (*Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343.) The law of the State of New York, as declared by the Court of Appeals, is that a dissenter has no such right and that when he receives full, fair and complete compensation for every right he possesses, he cannot go further and obstruct, hinder and delay the company from taking action which the great majority of stockholders approve.

In *Beloff* v. *Consolidated Edison Co.*, 300 N. Y. 11, it is said (p. 19):

> "It is fully as well settled that if the merger (or consolidation) is duly consummated in accordance with the statutes, the remedy of appraisal and payment is the only one available to dissenting shareholders, and that such dissenters on such an appraisal are entitled to receive fair and full compensation for all their rights (*Matter of Timmis*, 200 N. Y. 177; *Logan* v. *New Amsterdam Gas Co.*, 224 N. Y. 664; *Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343, 350; see *Matter of Fulton*, 257 N. Y. 487, 494). * * *
>
> "In short, the merged corporation's shareholder has only one real right; to have the value of his holding protected, and that protection is given him by his right to an appraisal (see *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 535)."

See, also:

Liebschutz v. *Schaffer Stores Co.*, 276 App. Div. 1, 6;

Anderson v. *International Minerals & Chemical Corp.*, 295 N. Y. 343.

IX

The petition should be denied.

Respectfully submitted,

NEIL P. CULLOM,
Counsel for Respondents.

HUYLER HELD,
STANFORD SCHEWEL,
On the Brief.

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

against

R. HOE & CO., INC., *et al.*,

Respondents.

Affidavit of Charles E. Littleton

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES E. LITTLETON, being duly sworn, deposes and says:

I am secretary of R. Hoe & Co., Inc., respondent herein. This affidavit is submitted in opposition to petitioner's application for a writ of certiorari.

The Parties

(1) This suit was brought in equity to obtain an injunction to restrain the consummation of a plan of consolidation under section 86, New York Stock Corporation Law,

which was approved by the stockholders of R. Hoe & Co., Inc., on September 12, 1950. Plaintiff, a lawyer, acquired 500 shares of common stock, representing an approximate investment of $4,000, out of an issue of 160,000 shares, or 3/1000ths of that issue on December 23, 1949, at just about the time this plan was being considered. At the time of the consolidation there were outstanding 95,997 shares of Class A stock, 194,767 shares of B stock and 160,000 shares of Common stock.

Katz is the sole stockholder now attempting to veto the consolidation.

Respondent, R. Hoe & Co., Inc., is a manufacturer of printing presses, located in New York, N. Y., and the individual defendants are its officers and directors.

The Plan Is Fully Consummated

(2) On Novemer 29, 1950, after the Appellate Division had unanimously denied petitioner's motion for a stay pending appeal from a judgment dismissing the complaint on the merits, said consolidation was duly consummated and the certificate of consolidation filed in the office of the Department of State of the State of New York; the new securities under said plan have been issued; and stockholders owning the old securities have exchanged the same, in large part, for the new, as follows:

Class A

Authorized	*Issued and outstanding*	*Ratio of outstanding stock to authorized stock*	*Value of issued and outstanding Class A stock at approximate market of $15 per share*
481,371.5 shrs.	472,271	98.109%	$ 6,139,523

Common Stock

uthorized	*Issued and outstanding*	*Deposited in and subject to appraisal proceedings*	*Ratio of outstanding stock to authorized stock after deducting shares in appraisal proceedings*	*Value of issued and outstanding common stock at the approximate market value of $8.62½ per share*	
46,761	462,242	66,547	96.258%		$ 3,986,889

Total indicated market value of new Class A and Common Stock distributed on surrender of old stock.....$ 10,126,412

Four dividends have been declared and paid on the new securities, *i.e.*, on January 15, 1951, April 15, 1951, July 15, 1951 and October 15, 1951.

The new Class A stock has been fully listed on the New York Curb Exchange and bought, sold and traded in on said exchange. The new common stock has been bought, sold and traded in on the over-the-counter market. Rights of the holders of these securities have become vested. There are approximately 2500 stockholders of this company and they are located in virtually every state of the United States and some in foreign countries.

All Questions Now Urged by Petitioner Are Moot

(3) It is clear that this suit brought for an injunction is now wholly academic. There is no act in respect of the consolidation which this court can restrain. The questions sought to be presented are moot.

Petitioner advances the pretense that the suit is for a declaratory judgment. On the contrary, an attorney, applying for a stay pending appeal, on behalf of petitioner

swore on November 1, 1950: " Under the circumstances, denial of the stay will *destory the purpose of the entire litigation* and effect irreparable injury and harm to the common stockholders". On November 15, 1950 he again swore: "The requirement of a bond would nullify the stay and *render the litigation nugatory*". He again stated on October 3, 1950: "The denial of the stay would *nullify any judgment* they (plaintiffs) might obtain".

It is thus clear that petitioner has deemed the suit, and so represented to the court, as one solely for an injunction.

Katz Is the Sole Stockholder Now Challenging the Consolidation

(4) Katz, representing 3/1000ths of the common stock, last in the order of senority, is the sole stockholder now attacking this consolidation. He asserts that "the petitioner and the holders of 93,000 common shares of Hoe have been deprived of property without compensation worth over $1,500,000" (p. 35). This statement is utterly false. As we have shown, 96.25% of all the common stock which can be exchanged under the plan has been so exchanged and is now enjoying the dividends and other benefits which it affords. There is not one stockholder who joins him in this effort to prolong this litigation and no one will have anything to do with this strike suit. He represents no one but himself in trying to veto a plan which has met with the overwhelming approval of all classes of stock. Another common stockholder, one Martin, joined him originally, but has abandoned the suit.

Katz has suffered no damage. The average price per share of the common stock from June 1, 1948, to December 4, 1950, according to the National Quotation Bureau, was $6.87; the price on the day before the consolidation, September 11, 1950, was approximately $7 per share and the

current price is approximately $8.62 per share, or with accrued dividends of 50¢ per share, $9.12.

If he exchanges his stock he will obtain the new stock and accrued dividends. The right of appraisal was at all times available to him; or he can sue at law if he be so advised.

Fifteen different state court judges and four federal judges have, without a single exception, ruled against plaintiff. It is a groundless suit, pure and simple; and if this court is to pronounce judgment on the abstract questions which petitioner seems to want decided, it is submitted that it should be done in a real controversy, not a moot, academic abstraction, where there is no act which can be restrained and where plaintiff's cause has been found, by all the courts who have passed on it, utterly wanting in equity.

The Alleged "Federal Questions" Were Not Saved for Review

(5) Petitioner's complaint in the court below contained a prayer for relief that the Court hold that "said *proposed meeting* (of stockholders) if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of the laws of the State of New York, the Constitution of the State of New York, the Constitution of the United States of America and amendments 5 and 14 thereof, the Securities Exchange Act of 1934, and appropriate and relevant regulations issued thereunder" (R. 15). (Italics supplied.)

Except for the above statement the alleged constitutional questions now sought to be reviewed, were not raised on the trial and were not argued orally or in petitioner's briefs before the trial court, the Appellate Division or the New York Court of Appeals.

It is respectfully submitted that the petition should be denied.

CHARLES E. LITTLETON

Sworn to before me this 17th day of October, 1951.

HELEN SCHAEFFLER
Notary Public, State of New York
Qualified in Kings County
No. 24-8787900
Cert. filed with Kings Co. Reg.
N. Y. and Bronx Co. Clk's. and Reg's.
Commission Expires March 30, 1952.
(Seal)

NOV 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & CO., INC., similarly situated,

Petitioner,

v.

R. HOE & CO., INC. *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER

GUSTAVE B. GARFIELD,
Attorney for the Petitioner.

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ARGUMENT.

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I—"The right to be a freeman of a corporation is a valuable temporal right. It is the right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for the violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections: it is a sacred right" (Story, J., in *Dartmouth College* v. *Woodward,* 4 Wheat. 518, P. 701) 1

II—"One gathers that the cumulative voting privilege when once accorded, cannot be taken away except by authority equal in grade to that by which the privilege was conferred" (Bowes & de Bow, Minn. Law Review, 1937, Vol. XXI No. 4, p. 351) 4

(c) When created pursuant to a Plan of Reorganization, approved by decree of the United States District Court, Cumulative and other Voting rights can be abrogated only in the manner provided in the Plan of Reorganization, and with the consent of the Bankruptcy Court which issued the decree approving the Plan. It is a judgment *in rem.* It may not be collaterally attacked or modified by a State Court, but effect must be given to it under the doctrine of *res judicata* 5

III—Consolidation of two corporations under State law may not be availed of as a device to evade the provisions of a plan of reorganization in bankruptcy 12

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IV—The Federal questions were saved for review by presentation at the trial court, at the Appellate Division and at the Court of Appeals of the State of New York. Petitioner is prepared to accept Respondents' summary of the Federal question as it appears in the Respondents' brief below (see appendix, pp. 70 and 100, *infra*, for extracts from certified copies) as a basis for the granting of a writ by this Court 18

The Federal Questions presented (as amended):

Whether the consolidation of Hoe with its subsidiary violates its Plan of Readjustment and Amended Certificate of Incorporation both approved by the Decree of the United States District Court in the 77 B Proceeding of 1935, by depriving the common stockholders of their vested cumulative and other voting rights without their majority consent, and without the approval of the United States District Court, both of which are immutably required by said Plan and by the Decree of the U. S. District Court approving it? 19

V—Since the constitutional question was not the sole question presented to the New York Court of Appeals for its consideration Petitioner was not entitled to appeal to that court as a matter of right and the denial by it—the highest court of appellate jurisdiction of the State of New York—of Petitioner's motion for leave to appeal requires that the Writ of Certiorari issue to the Appellate Division, the intermediate appellate court which rendered the final judgment herein 19

VI—Federal Judge McGohey ruled on November 6, 1951, "the petitioner sought and failed to justify

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the intervention of the State Court. He cannot, while pressing his appeal there, relitigate the same issues in this Court. (*Davega City Radio Inc.* v. *Boland,* D. C. S. D. N. Y., 23 F. Supp. 969, 970.)" His decision dismissing the Petitioner's application for relief in the Federal Courts is therefore not *res judicata* in the very appellate courts to which Petitioner appealed, pursuant to the suggestion of Judge McGohey, nor in this Court, where the State Court judgments are sought to be reviewed 21

VII—The non Federal grounds assigned by the State Courts as a basis for decision are not adequate to defeat review by this Court. The failure or refusal of the State Courts to pass upon the Federal issues, which would have been and are decisive of the entire litigation, "may be properly regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question" 23

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